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in the

Supreme Court

of the

United States

OCTOBER TERM, 1971

Supreme Court, U. S.
FILED
APR 27 1972
MICHAEL RODAK, JR., CLERK

NO. ———

MIAMI POLICE BENEVOLENT ASSOCIATION, INC.,
Petitioner,

vs.

GEORGE H. ADAMS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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GEORGE H. ADAMS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, MIAMI POLICE BENEVOLENT ASSOCIATION, INC., a Florida corporation, respectfully prays that a Writ of Certiorari issue to review the Findings of Fact and Conclusions of Law and Final Judgment of April 27, 1971, of the United States District Court for the Southern District of Florida, and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 2, 1972.

OPINION BELOW

The Findings of Fact and Conclusions of Law and Final Judgment, along with the Final Opinion of the Court of Appeals, appear in the Appendix herein.

JURISDICTION

The Findings of Fact and Conclusions of Law and Final Judgment of the District Court were entered on April 27, 1971. Thereafter a timely appeal was taken to the Court of Appeals for the Fifth Circuit, whose Opinion was rendered February 2, 1972, and this Petition for Certiorari was filed within the ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

I.

WHETHER THE PETITIONER WAS DENIED ITS RIGHT TO TRIAL BY JURY AS SECURED UNDER THE SEVENTH AMENDMENT UNDER THE UNITED STATES CONSTITUTION.

II.

WHETHER THE DISTRICT COURT LACKS JURISDICTION TO RENDER JUDGMENT AGAINST PETITIONER, PURSUANT TO TITLE 42 USC Sections 1981-83, WHERE AS A MATTER OF LAW THE EVIDENCE DID NOT SUPPORT A FINDING OF "STATE ACTION" OR DEPRIVATION OF A "CONSTITUTIONAL RIGHT."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

AMENDMENT XIV.

Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES CODE

Title 42, U.S.C. Sec. 1981:

"Sec. 1981. Equal rights under the law

All persons within the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties,

give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Title 42, U.S.C. Sec. 1982:

"Sec. 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Title 42, U.S.C. Sec. 1983:

"Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The Respondents, Appellees-Plaintiffs below, fifty-one (51) in number, filed their Complaint, Appendix 1-6 below, in the United States District Court in and for the Southern District of Florida, on January 29, 1971, to enjoin the Miami Police Benevolent Association, Inc., a Florida corporation, Petitioner, Appellant-Defendant below, from its alleged racially discriminatory practices by virtue of 42 USC 1981-1983. All of the listed Plaintiffs were black officers of the Miami Police Department, Miami, Florida.

It further alleged that the Petitioner operated under color of state law with the overt cooperation of the City of Miami and the State of Florida. It was further alleged that the Petitioner has pursued and continues to pursue a pattern or practice in custom or usage of racial discrimination, which has deprived, intended to deprive, the Respondents and members of their class of the same right to make and enforce contracts, the same right to enjoy property, and the same right to enjoy equal protection of the law as enjoyed by white persons. That by virtue of the foregoing, that the Petitioner be required to immediately offer membership to all black employees of the City of Miami Police Department and until such time as said offer of membership is made, that the Defendant be enjoined from (1) operating its canteen and vending machines on the premises of the City of Miami Police Department, (2) from soliciting membership from prospective members of the City of Miami Police Department, (3) representation at staff meetings of the City of Miami Police Department, (4) representation at the Police Department City Commission

meetings, especially in regard to bargaining for wages, (5) soliciting contributions from the public for its organization, and (6) use of the name police.

Thereafter, Respondents filed a Motion for Preliminary Injunction, Appendix 10 below. On March 15, 1971, the Petitioner filed a Motion to Dismiss on the grounds of lack of jurisdiction and the failure to state a cause of action, Appendix 23 below. On March 22, 1971, the lower Court granted Petitioner's Motion to Dismiss as to 42 USC 1984-1988, Appendix 104 below, and denied the balance of the Motion to Dismiss.

On April 12, 1971, Petitioner's Answer was filed denying the material allegations of the Complaint and requested a trial by jury pursuant to the Seventh Amendment to the Constitution of the United States, and Rule 38 A, Federal Rules of Procedure. Thereafter, the cause came on for Final Hearing on April 23, 1971, at which time the Court denied the Defendant's Motion for Trial by Jury.

This is an appeal by the Petitioner from the Findings of Fact and Conclusions of Law and Final Order made by the district court and the Fifth Circuit that the Petitioner is not a private club, inasmuch as it is open to all classified policemen who are now regularly employed by the City of Miami Police Department under civil service, and that it has engaged in a pattern or practice and custom or usage of racial discrimination, and that such discrimination was under the color of state law and that as a result thereof, have denied the Plaintiffs the same right to make contracts as white persons and the same right to enjoy property as white persons.

The lower Court ordered that:

> "The defendant shall forthwith offer full membership to all classified black policemen, in good standing, who are now regularly employed by the City of Miami Police Department under Civil Service; and all black classified policemen, in good standing, who will be regularly employed by the City of Miami Police Department in the future; provided, that any black policemen who are over the age of 32 years at the time of their admission into the defendant shall not share in its death benefit fund." Appendix 562 below.

It is the contention of the Petitioner, that the Findings of Fact and Conclusions of Law and Final Order of April 27, 1971, by the district court are not supported by the testimony and evidence and are contrary to the law.

The Judgment of the district court was affirmed by the Court of Appeals finding that the district court's Findings of Fact and Conclusions of Law were not erroneous and were supported by the evidence. The Court of Appeals in short held that the Petitioner was engaged in a practice of racial discrimination under color of State law and had deprived Respondents of federally guaranteed constitutional rights pursuant to 42 USC 1983, not reaching 42 USC 1981 and 1982.

"Appendix below" shall be record supplied by 5th Circuit.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT AND COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE SEVENTH AMENDMENT OF THE U.S. CONSTITUTION.

The Seventh Amendment provides that, "[i]n suits at common law . . . the right to trial by jury shall be preserved . . . ."

The District Court denied Petitioner the right to trial by jury for the reason that the Respondents' claim was "wholly an equitable action, and there is no right of a jury trial." See p. 411 of Appendix below.

The Supreme Court has held that where legal and equitable claims are intertwined, irrespective of the equitable nature of the claim, there is a right to trial by jury as secured by the Seventh Amendment. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) [hereinafter cited as *Beacon*]; *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) [hereinafter cited as *Dairy Queen*].

The Fifth Circuit has held that the mere assertion of a monetary claim in an equitable action will give rise to the right to a jury trial. *Thermo-Switch, Inc. v. Chemical Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961) [hereinafter cited as *Thermo-Switch*].

However, the Fifth Circuit has held "that the trio of *Beacon Theatres*, *Dairy Queen*, and *Thermo-Switch* is [not]

a catalyst which suddenly converts *any* money request into a money claim triable by jury." *Swofford v. B & W, Inc.*, 336 F.2d 406, 414 (5th Cir. 1964); *Harkless v. Sweeny Ind. School Dist.*, 427 F.2d 319 (5th Cir. 1970).

The case at bar deals with a prayer for purely injunctive relief, but the mere wording of the Complaint as an equitable action is not sufficient to deny Petitioner its right to trial by jury. *Dairy Queen*, Supra. The whole import of the Respondents' claim for relief was founded on a monetary claim. If Respondents were given membership in Petitioner's organization, the net result would be a taking of property without due process of law, *i.e.*, without a trial by jury.

In the wording of the Fifth Circuit, in the case *sub judice*, "[s]urely the black officers have as much right as the white officers to this *money*." (Emphasis added.) Therefore, the taking of property without a trial by jury violated the Seventh Amendment of the United States Constitution.

These conflicts justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW WAS "CLEARLY ERRONEOUS" WITH RESPECT TO ITS INTERPRETATION OF 42 USC §§ 1981 AND 1982.

Sections 1981 and 1982 of Title 42 provide that all citizens of the United States shall have the same rights as white citizens with respect to the right to enter into contracts (§ 1981) and to buy, sell, lease, and/or inherit

real and personal property (§ 1982). Although the Fifth Circuit did not deal with these statutes in affirming the judgment of the district court (see p. 2 Appendix—Circuit Court Opinion), the district court found violations of these statutes (see pp. 566-67 Appendix below).

(1) The Supreme Court in *Jones v. Alfred H. Mayer Corp.*, 392 U.S. 409 (1968) [hereinafter cited as *Jones*], stated that all discrimination based on race is actionable under § 1982 whether it be private or public in nature. The district court below found that Petitioner had deprived Respondents of constitutional rights pursuant to § 1982. The record is barren as to any evidence that Petitioner deprived Respondents of any right to buy, sell, lease, or inherit any *real* property as provided by § 1982 or *Jones*. The only testimony that appears in the record is that Petitioner *did not* discriminate in the leasing of property with respect to any persons. See pp. 449-50 Appendix below.

Additionally, Petitioner is a non-profit organization whose members have no vested right in any of the real property owned by the Petitioner for the use and benefit of underprivileged children (Plaintiff's Exhibit No. 1, pp. 39-40). Therefore, Respondents were not denied the right to sell, lease, buy, own, or inherit property under § 1982 and the District Court's judgment as it applies to § 1982 was "clearly erroneous" and must be set aside pursuant to *United States v. Gypsum Co.*, 333 U.S. 364 (1947).

(2) In *Jones*, the Supreme Court decided the case under § 1982. Additionally, the Court intimated that "State action" was unnecessary for § 1981 as well as § 1982. However, in a recent District Court opinion, it was stated that § 1981 requires "State action" because § 1981 had a com-

pletely different derivation from § 1982 as they were originally drafted. *Cook v. Advertiser Co., Inc.*, 323 F.Supp 1212 (M.D. Ala. 1971).

Irrespective of the requirement of State action (see pp. 12-16, infra) there must be a deprivation of the right to contract. The only evidence which tends to support such a violation would be the negotiating powers of the Petitioner with the City of Miami. However, the record also discloses that Petitioner is not the *exclusive* bargaining agent for Respondents and the record does not disclose any contract between the Petitioner and the City of Miami with respect to negotiating. The record does disclose that Respondents are members of organizations which participate in negotiations with the City (Miami Community Police Benevolent Association and Fraternal Order of Police), and that organizations exist which represent the interests of white and black police officers alike at these negotiations (Fraternal Order of Police). See pp. 215, 468, 469, Appendix below.

Therefore, Respondents were not denied the right to contract with the City due to any action on the part of the Petitioner. Additionally, a mere allegation under § 1981, without clear and substantial proof or without any proof is sufficient to support a motion to dismiss for failure to state a claim. *Negrich v. Hohn*, 379 F.2d 213 (3d Cir. 1967). *A fortiori*, mere conclusory allegations without supporting evidence will not support a judgment.

These "clearly erroneous" rulings and conflicts justify the grant of certiorari to review the judgment below.

3. THE DECISION BELOW WAS "CLEARLY ERRONEOUS" AND CONFLICTS WITH SUPREME COURT AND OTHER COURT OF APPEALS DECISIONS WITH RESPECT TO ITS INTERPRETATION OF 42 USC § 1983.

Section 1983 of Title 42 provides that no citizen shall be deprived of any federally guaranteed rights secured by the Constitution by any "person" acting under color of State law.

The Fifth Circuit and the district court found the necessary requirements for 1) State action and 2) deprivation of a constitutional right in their opinions. The Fifth Circuit merely affirmed the Findings of Fact and Conclusions of Law made by the district court (pp. 562-69, Appendix below) and found the necessary requirements. See, Appendix—Court of Appeals Opinion, pp. 3-8.

(1) The district court found State action for the following reasons: 1) The fact that Petitioner uses the name "Police" when holding itself out to the public; 2) Petitioner solicits funds from the public; 3) Petitioner operates a canteen on City of Miami property, operates vending machines on City property, has a bulletin board for its members use on City property, and solicits membership at the police academy; and 4) That Petitioner is represented at staff meetings and City Commission meetings where it "bargains" for "wages and other terms of employment" and police policies. See pp. 563-64, Appendix below.

The Supreme Court has stated, in interpreting § 1983, that

> "the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections." *Adickes v. S. H. Kress and Co., 398 U.S.* 144, 169 (1970).

Furthermore, in *Adickes*, the Court stated that

> "a State is responsible for the discriminatory act of a private party when the State, by its law [statutory or by custom], has *compelled* the act." (Emphasis added) *Id.* at 170.

The record, in the case at bar, is void of any evidence that the State or the City of Miami has *compelled* the Petitioner to discriminate against the Respondents by any laws or customs. Therefore, there was no "State action" for these reasons.

Additionally, the mere fact that the members of the Petitioners are police officers, in and of itself, does not raise an action under § 1983. *Cole v. Smith*, 344 F.2d 721 (8th Cir. 1965). "[The] acts of [police] officers in the ambit of their personal pursuits are plainly excluded [from State action]." *Watkins v. Oaklawn Jockey Club*, 183 F.2d 440 (8th Cir. 1950). Nor does the fact that Petitioner bargained for wages with the City of Miami constitute "State action". *Williams v. Yellow Cab Co. of Pittsburgh*, 200 F.2d 302 (3d Cir. 1952). However, racial discrimination by "unions" with respect to "the right to employment" is actionable. *Waters v. Wisconsin Steel Wks. of Int'l Harvester Co.*, 427 F.2d 476 (7th Cir. 1970). But, there has been no evidence introduced to support such a claim, nor have any allegations been made, in this respect, in the case *sub judice*.

Therefore, the only evidence with which the district court could have found State action was the use of the City of Miami property and solicitation of funds from the public.

The Second Circuit has recently held that the Legal Aid Society (of New York City), although it receives 80% of its funding from City, State and Federal funds and 15% of its funding from public contributions, does not act under color of State laws. Additionally, the "Society" was given the use of office space in City buildings. *Lefcourt v. Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971). The Second Circuit concluded that

> "it cannot be said that the Society acts under color of State law by virtue of the financial and other benefits which it receives from the City and various other governmental agencies, courts and subdivisions, since there has been no sufficient showing of governmental control, regulation or interference with the manner in which the Society conducts its affairs." *Id.* at 1155.

In reaching the decision, the Court stated that "control, regulation or interference" by the City would be inconsistent with the purposes of the "Society."

The Respondents, in the case *sub judice*, have failed to show by any evidence any "control, regulation or interference" by the City of Miami. Additionally, any such control would be inconsistent with the purposes of the Petitioner. Therefore, no state action was present.

The district court also found "State action" in that the Petitioner leased a "canteen" from the City. The district court reasoned that this constituted State action as described in *Burton v. Wilmington Park Authority*, 365 U.S. 715 (1961). See p. 567, Appendix below. However, *Burton* was distinguished in *Lefcourt* for the reason that the discrimination did not arise out of the lease arrangement between the City and the "Society," as was the case in *Burton*. *Lefcourt v. Legal Aid Society*, 445 F.2d 1105 (2d Cir. 1971). Additionally,

> the State must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968)

See also, *Martin v. Pacific Northwest Bell Telephone Co.*, 441 F.2d 1116, 1118 (9th Cir. 1971), citing *Powe v. Miles*, supra.

As the record, in the case, *sub judice*, clearly states, there are no discriminatory practices with regard to Petitioner's operation of the "canteen." See pp. 450, 468, 489-490, Appendix below. Therefore, no "State action" can be found in the Petitioner's leasing of the premises.

(2) The second requirement under § 1983 is that the Respondents be deprived of a federally guaranteed right by the Petitioner. The district court found that Petitioner had denied Respondents "the rights guaranteed them by 42 U.S.C. 1983." See p. 564, Appendix below.

The only rights that Respondents have been denied are "property rights", the right to the monetary funds of the Petitioner. However, § 1983 is based on deprivation of personal liberties and not monetary rights. *Bradford Audio Corp. v. Pious*, 392 F.2d 67 (2d Cir. 1968).

As the Second Circuit stated in *Bradford*, the right sought to be enforced under § 1983 must be "unrelated to and not dependent upon an invasion or deprivation of property interests." *Id.* at 72. The Court further stated that

> [a]s the loss of freedom derives from and is dependent for its existence upon the infringement of the property right the action is not within the jurisdiction of § 1983. *Id.*

In addition, the right to work has been deemed a property right and not a right of personal liberty unless the employee's reputation is involved which "effectively destroys his ability to engage in his occupation. . . ." *Tichon v. Harder*, 438 F.2d 1396, 1402 (2d Cir. 1971). In the case *sub judice*, neither allegations nor evidence have been submitted by Respondent in this respect.

The district court and the Fifth Circuit failed to follow these lines of reasoning below and the judgment, upon the evidence was "clearly erroneous."

These "clearly erroneous" rulings and conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of April, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to WILKIE D. FERGUSON, JR., McCRARY, FERGUSON & LEE, Attorneys for Respondents, 6103 Northwest 7th Avenue, Miami, Florida; and three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to JON D. CAMINEZ, ESQUIRE, Attorneys for Respondents, 207 East Park Avenue, Tallahassee, Florida. I further certify that all parties required to be served have been served.

K. NEIL GLASSFORD

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APPENDIX

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

NO. 71-137-Civ-TC

GEORGE H. ADAMS, et. al.,
Plaintiffs,

vs.

MIAMI POLICE BENEVOLENT ASSOCIATION, INC.,
Defendant.

(Filed April 28, 1971)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having regularly come on for trial commencement on April 23, 1971, upon the plaintiffs' claim against the defendant, Miami Police Benevolent Association, Inc., and counsel for the plaintiffs and the defendant having appeared and the Court having heard the evidence and argument of counsel for each party, it now finds the following facts and states the following conclusions of law:

I. FINDINGS OF FACT

A. The Parties

1. The plaintiffs are all classified black policemen who are now regularly employed by the City of Miami

Police Department under Civil Service, and all black classified policemen who will be regularly employed by the City of Miami Police Department under Civil Service in the future.

2. The defendant, Miami Police Benevolent Association, is a non-profit corporation made up of members of the Miami Police Department, and has its offices located in Miami, Florida. Among its purposes are to promote the efficiency of the police department, to promote cooperation and harmony of its members, and to promote harmony and cooperation with the general public and public officials.

3. The defendant maintains the following funds which its membership is entitled to participate in and which benefits its membership:

a. A death benefit fund.

b. A group insurance fund.

c. A retirement fund.

d. A sick and disability fund.

e. An attorneys' fund.

4. This Court has jurisdiction over the parties and the subject matter of this action.

B. The defendant acts under color of state law and is an adjunct of the City of Miami Police Department.

1. The defendant uses the name police in its title and holds itself out to the public by using the name police in its title.

2. The defendant solicits contributions from the public using the name police. In fact, in the last fiscal year, the defendant solicited over $90,000 from the public by holding itself out to be police officers of the City of Miami Police Department.

3. It operates a canteen at the City of Miami Police headquarters. In operating this canteen, the defendant employs four persons, and in addition, uses prison labor. The canteen operation nets the defendant over $200. per month.

4. The defendant operates vending machines and has the use of bulletin boards at the City of Miami Police Department.

5. The defendant is represented at staff meetings held at the City of Miami Police Department where policies of the police department are discussed and made.

6. The defendant is represented at City Commission meetings where it bargains for wages and other benefits for the City of Miami Police Department.

7. The defendant uses the facilities of the local police department, including its police academy to solicit prospective members. In fact, it has enrolled over 75% of its members through solicitation at the police academy.

8. The defendant uses the City of Miami Police Department for meetings and in fact, has used the police department building in casting ballots for its officers.

9. All of the above activities are conducted openly with the consent and approval of the City of Miami Police Department.

C. Discriminatory Acts of the Defendant.

1. The defendant has never had a black member. At the present time the defendant has over 400 members, all of whom are caucasian.

2. Until March 23, 1970, the defendant had a clause in its Constitution "For Caucasians Only". This clause made it impossible for a black person to become a member. In 1959, Willie Calhoun, a black officer applied and was rejected because of this clause. David Madison and George Kemp, black officers of the Miami Police Department, were told at the police academy that the defendant was for caucasians only and that they should seek their own organization, the Community Police Benevolent Association.

3. Up until March 23, 1970, only one white applicant was rejected for membership in the defendant.

4. The defendant has always had a provision that a prospective member must be over 21 years of age and under 32 years of age.

5. The defendant has a clause that a person must be under 32 years of age because it maintains a death benefit fund. This fund is maintained on an actuarial basis, and on the basis of the recommendations of the defendant's actuaries, the above limit has been set.

6. On March 23, 1970, the clause "For Caucasians Only", was deleted from the defendant's Constitution. On March 23, 1970, the defendant also changed the voting procedure with respect to a prospective applicant. Prior to March 23, 1970, it was only necessary for a prospec-

tive member to receive a majority vote of the membership in order to be accepted. After March 23, 1970, five negative votes of the membership could veto a prospective applicant.

7. Since March 23, 1970, 28 white applicants have applied for membership with the defendant. Only four white applicants were rejected. Since March 23, 1970, seven black applicants have applied for membership with the defendant. All of the black applicants were rejected on December 22, 1970. The four white applicants were rejected on this same date as the black applicants.

8. The deletion of the clause "For Caucasians Only" has been substituted for by the inclusion that the negative votes of any five members of the defendant can exclude a prospective applicant. This change is negative and has effectively barred black policemen from membership in the defendant.

9. The defendant, Police Benevolent Association, over the years has pursued and continues to pursue a pattern or practice of racial discrimination which has deprived and continues to deprive the plaintiffs of the same right to make and enforce contracts, the same right to enjoy property, and the same right to enjoy equal protection of the laws as is enjoyed by white persons.

10. The plaintiffs, over the years, have accepted all caucasian applicants who were under the age of 32, who were regularly employed classified police officers for the City of Miami Police Department under Civil Service, who were in good standing with the police department, and who paid their $5.00 application fee.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action under 42 U.S.C. Section 1981 through 1983 and pursuant to 28 U.S.C. 1343(3) and 1343(4).

2. The defendant, Miami Police Benevolent Association, has engaged in a pattern or practice and custom or usage of racial discrimination in violation of the rights guaranteed black persons by 42 U.S.C. 1981 through 1983.

3. A pattern or practice of discrimination which denies black persons the same right to make contracts as white persons and the same right to enjoy property as white persons violates 42 U.S.C. 1981 and 1982. Jones v. Mayer, 392 U.S. 409 (1968); Sullivan v. Little Hunting Park. 396 U.S. 229 (1969); Sanders v. Dobbs House, 431 F.2d 604 (5th Cir. 1970); Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970); and Harkless v. Sweeney Independent School District, 427 F.2d 319 (5th Cir. 1970).

4. The defendant, Miami Police Benevolent Association, is open to all classified policemen who are now regularly employed by the City of Miami Police Department under Civil Service, and therefore, is not a private club. Sullivan v. Little Hunting Park, 396 U.S. 229, 236 (1969).

5. The discrimination practiced by the defendant, under color of state law, has denied the plaintiffs the rights guaranteed them by 42 U.S.C. 1983. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

6. The deletion of the clause "For Caucasians Only" from defendant's Constitution cannot justify the imposition of a new and more onerous five negative vote requirement, which though theoretically applicable to all, prac-

tically affects primarily black policemen who bore the brunt of previous discrimination. United States v. State of Louisiana, 225 F.Supp 353 (E.D., La. 1963); Louisiana v. U. S., 380 U.S. 145 (1965); United Papermakers & Paperworkers v. U. S., 416 F.2d 980, 989, 5 Cir. (1969) and Local 53 of the International Association of Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

7. The defendant's seemingly neutral policy of requiring a prospective member to be under 32 years of age carries forward its past discriminatory policies into the future. A court has not merely the power, but the duty to render a decree which will go as far as possible to eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Louisiana v. U. S., 380 U. S. 145 (1965); United Papermakers and Paperworkers v. U. S., 416 F.2d 980 (5th Cir. 1969); Quarells v. Phillip Morris, 279 F.Supp 505, 517 (E.D., Va. 1968); Local 53 of the International Association of Heat & Frost Insulators & Abestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); and Dobbins v. Local 212 I.B.E.W., 292 F.Supp 413 (S.D., Ohio 1968).

8. Relief requiring affirmative remedial acts, in order to correct the effects of a pattern and practice of racial discrimination, is necessary and proper. Louisiana v. United States, 380 U.S. 145 (1965); Local 53 of the International Association of Heat & Frost Insulators & Abestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Jones v. Mayer, 392 U.S. 409 (1968) and United States v. Jefferson County Board of Education, 372 F.2d 836, (5th Cir. 1967).

FINAL ORDER

NOW, THEREFORE, the Court enters the following as its Final Order in the above entitled cause, which shall be applicable to the defendant, Miami Police Benevolent Association, its officers, agents, and employees and all other persons acting in concert or participation with them.

The defendant shall forthwith offer full membership to all classified black policemen, in good standing, who are now regularly employed by the City of Miami Police Department under Civil Service; and all black classified policemen, in good standing, who will be regularly employed by the City of Miami Police Department in the future; provided, that any black policemen who are over the age of 32 years at the time of their admission into the defendant shall not share in its death benefit fund.

Dated: April 27, 1971.

/s/ Ted Cabot

U. S. DISTRICT COURT JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2108

GEORGE H. ADAMS, ET AL.,
Plaintiffs-Appellees,

versus

MIAMI POLICE BENEVOLENT ASSOCIATION, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(February 2, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge: This appeal arises from the district court's order that all black officers in good standing on the Miami police force be admitted to membership in appellant Miami Police Benevolent Association, Inc. Appellant is a nonprofit corporation made up of white members of the City of Miami Police Department. Among its purposes are "promoting the efficiency of the police department, promoting cooperation and harmony between its members and promoting harmony and cooperation with the general public and public officials."

Named plaintiffs are 51 of the approximately 70 black policemen on the Miami force. They filed this class suit based on 42 U.S.C.A. §§ 1981-88, seeking equitable relief to prevent appellant from continuing its alleged racially discriminatory practice of barring blacks from membership and to eliminate the effects of past discrimination. The district court defined the class as "all classified black policemen who are now regularly employed by the City of Miami Police Department under Civil Service and all black classified policemen who will be regularly employed by the City of Miami Police Department in the future." The court dismissed the portions of the complaint grounded on 42 U.S.C.A. §§ 1984-88 but found violations of §§ 1981-83. Since we believe appellees have made their case under § 1983,[1] we shall not reach §§ 1981 and 1982.

> The terms of § 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory." This second element requires that the plaintiff show that the defendant acted under "color of law."

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[1] 12 U.S.C.A. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Adickes v. Kress & Co., 398 U.S. 144, 150 (1970). The district court concluded that appellant Association was an "adjunct" of the City of Miami Police Department acting under color of state law, and that it had denied appellees equal protection of the law in contravention of the fourteenth amendment. The Association argues on appeal that it is a private club, not a quasi-public body, and that it has not deprived appellees of any constitutional right.

I. State Action.

The bases for the district court's fact finding that appellant is an adjunct of the City of Miami Police Department may be summarized as follows:

1. Appellant uses the name "police" in its title and holds itself out to the public as "the police."

2. Appellant solicits contributions from the public, using the name "police." In its last fiscal year appellant raised over $90,000 from the public.

3. Appellant operates a canteen at the City of Miami police headquarters. It employs prison and nonprison labor.[2]

4. Appellant operates vending machines at police headquarters and uses bulletin boards at the headquarters.

5. Appellant is represented at staff meetings held at the police department at which police policy is made.

[2]This operation nets over $200.00 per month, which goes into appellant's underprivileged children's fund.

6. Appellant is represented at City Commission meetings where it bargains for wages and other terms of employment for Miami policemen.

7. Appellant uses the facilities of the Police Department, including its police academy, to solicit members. It enrolls a substantial number of its members through solicitation at the academy.

8. All of the above activities are conducted openly and with the consent and approval of the City of Miami Police Department.

We believe the district court correctly decided that appellant was so closely entwined with the City of Miami Police Department that it was acting under color of law when it barred appellees from membership. See Adickes v. Kress & Co., supra; Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). This finding was not clearly erroneous and was supported by the record.

II. Deprivation of a Constitutional Right.

The district court held that appellant has denied appellees equal protection of the law by its custom of barring blacks from membership because of their race. Appellant Association, which was formed in 1936, has never had a black member although black officers have applied. Blacks at the police academy have been told membership is not available to them. Until March 23, 1970 appellant's constitution had a "Caucasians only" clause. When that provision was deleted, the previous system of majority approval

of new members was dropped and replaced with one permitting five members to veto an applicant. Since implementation of the new veto system, seven black officers have applied and all have been rejected.

The district court found that the five-vote-veto provision was merely a substitute for the whites-only clause and was meant to achieve the same result. This fact finding was not clearly erroneous. The court also concluded that membership in appellant is automatic for white officers between the ages of 21 and 32 who apply and pay dues. The record, which indicates the exclusion of only one white prior to March 23, 1970, supports this conclusion. We think the district court correctly decided that appellees have been excluded from appellant organization solely because of their race.

The crux of appellant's case is that appellees have failed to show what constitutional rights have been denied them by exclusion from membership in appellant. Appellees are members of the Miami Community Police Benevolent Association, which is comprised solely of black officers. Appellant argues that appellees, acting through this Association, perform the same or similar functions as appellant and reap benefits similar to those available to appellant's members, that is, bargain with the city over wages and working conditions, attend Police Department staff meetings, solicit funds from the public, maintain vending machines and a bulletin board at police headquarters, and administer death, retirement, and attorney funds. Appellant contends, along lines of "separate but equal," that black officers thus suffer no unconstitutional deprivation as a result of exclusion from membership in appellant. We disagree.

The Miami police force is comprised of approximately 70 blacks and 650 whites. More than 400 of the white officers are members of appellant. The record starkly reflects that the black officers simply do not constitute a large enough group to effectively raise money from the public or amongst themselves to provide benefits to black officers equal to or even close to those appellant makes available to white officers. The black officers' association pays a $300 death benefit while appellant pays $1,000. Appellant's death benefit fund alone contains $137,000 while the black officers association's total assets are only $9,000. In addition to their numbers, appellees are hampered by the competition of appellant. Appellees have been consistently unsuccessful in obtaining funds from the public, a major source of revenue for appellant. The usual response to public solicitation appears to be, "I've already given to the police," the "police" being appellant. Appellant does not inform contributors that it is not asking for funds for the whole police force but only for an all-white association that includes about three-fourths of the whites on the force.

Appellees serve the whole city of Miami, not just the black population. They perform the same duties as white policemen. Nevertheless, the funds available to them and to their families for death benefits, sickness and disability, and legal assistance are grossly inferior to those available to white officers. Moreover, the black officers do not have their own building, purchased largely with public contributions, where they can hold meetings and social functions as the white officers do.[1] Arguably, they do not have the

[1]Appellant's death benefit fund, and sickness and disability fund are supported solely by dues. Funds solicited from the public go into the building fund and general operating fund. Appellant's constitution contains, however, no provision preventing the use of money contributed by the public in any or all of its funds.

same influence with the hierarchy of the police department and the city as the white officers do.[4] In short, a black officer on the Miami police force does not have rights, privileges, and benefits similar to those enjoyed by white policemen. This disparity is the result of appellant's racially discriminatory membership policies. The district court correctly decided that appellant has, while acting under color of law, deprived appellees of the right to equal protection of the law that is guaranteed them by the fourteenth amendment. In this situation § 1983 relief is appropriate.

III. Remedy.

The district court ordered:

> The defendant shall forthwith offer full membership to all classified black policemen, in good standing, who are now regularly employed by the City of Miami Police Department under Civil Service; and all black classified policemen, in good standing, who will be regularly employed by the City of Miami Police Department in the future; provided, that any black policemen who are over the age of 32 years at the time of their admission into the defendant shall not share in its death benefit fund.

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[4]We are unable to discern from the record the relative influence of the various police organizations represented in bargaining sessions with the city and at police staff meetings. We do note that appellant has 400 members and the black policemen's association only 50 members. Most of the black officers who testified viewed their organization as marginally viable. We thus decide only that the district court did not err in considering the exclusion of blacks from appellant Association, which is a major bargaining unit for policemen and influential in determining department policies, as one factor in concluding that appellant's racial discrimination denied appellees equal protection of the law.

Appellant urges that the order goes too far, resulting in fact in discrimination against whites. It points out that since the inception of its five-member-veto policy in 1970 several white policemen in good standing have been barred from admission. Yet the court has ordered that all present and future black officers in good standing be admitted. Whites could therefore be excluded for reasons other than their civil service status and willingness to pay dues, while blacks could not.

This argument is not persuasive. The matter of devising an appropriate remedy for deprivation of constitutional rights is addressed to the sound discretion of the trial judge. The district court concluded that appellant is open "to all [white] classified policemen who are now regularly employed by the City of Miami Police Department under Civil Service, ..." The record supports this conclusion, indicating that to the knowledge of the witnesses only one white policeman had ever been refused membership prior to March 23, 1970, when the whites-only clause was dropped. It is indeed unfortunate if the new membership provision, which the district court found was intended to exclude blacks, has resulted in the rejection of white officers.[5] We do not believe, however, that this is enough to require a modification of the district court's order. Given appellant's overt policy of racial discrimination that lasted until 1970, its present modified form of racial exclusion, and the virtually automatic membership for white policemen, the district court's order was appropriate.

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[5]The four white officers recently rejected were denied membership the same day as the seven black officers, who applied after the whites-only clause was deleted from appellant's constitution. The record suggests they were vetoed as a retaliatory move by members of appellant disgruntled by the rejection of the seven blacks.

Appellant also argues that the black officers should not be permitted to share fully in the various funds built up by appellant's members over a twenty-five year period. This contention has some superficial appeal, but that appeal disappears after brief reflection. The black officers have not contributed dues to the funds simply because appellant has excluded blacks from membership. Other than dues the principal source of appellant's wealth is public contributions ($90,000 last year) which were solicited on behalf of "the Police." Surely the black officers have as much right as the white officers to this money. Moreover, the district court, cognizant of the actuarial considerations pertinent to appellant's death benefit fund, did not grant black officers over 32 years old rights in that fund. Finally, we note the long line of precedent holding that affirmative remedial relief to correct the effects of a pattern and practice of racial discrimination is often necessary. Louisiana v. United States, 380 U.S. 145 (1965); Local 53 of the Int'l Assoc. of Heat & Frost Insulators & Asbestos Workers v. Vogler, 5th Cir. 1969, 407 F.2d 1047; United States v. Jefferson County Bd. of Educ., 5th Cir. 1966, 372 F.2d 836. This is such a case.

AFFIRMED

[TITLE OMITTED]

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

February 2, 1972

Issued As Mandate:

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in the
Supreme Court
of the
United States

NO. _____

MIAMI POLICE BENEVOLENT ASSOCIATION, INC.,
Petitioner,

vs.

GEORGE H. ADAMS, ET AL.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The response of the above named Respondents to the Petition for a Writ of Certiorari to review the decree of the Court of Appeals for the Fifth Circuit entered February 2, 1972, affirming the decree of the United States District Court for the Southern District of Florida, April 27, 1971, respectfully shows to this honorable court:

QUESTIONS PRESENTED FOR REVIEW

The fundamental question presented for review is whether a trial court's findings and appreciation of facts as concurred in by the court of appeals should be reexamined on writ of certiorari.

Petitioners present the question in three (3) parts:

1. Whether Petitioner is a private club with inherent right to be racially discriminatory with respect to membership.

2. Whether Petitioner is so significantly involved with the City of Miami Police Department so that its admitted discriminatory actions amount to constitutionally prohibited state action.

3. Whether Respondents have been deprived of constitutionally protected rights.

Petitioner's questions are subsumed within the fundamental question as stated above in that they go to the facts of the case at bar. The factual matters were found by the trial court to a conclusion, which findings of fact were not believed clearly erroneous by the Court of Appeals.

Additionally, Petitioners assert as error the trial court's denial of its motion for trial by jury. The trial court's denial of the motion was not raised as error, or as an issue presented for review either in written brief or on oral argument. The Court of Appeals did not make even passing reference to the question because it was not called upon to do so. Petitioners now raise the question of right to trial by jury in equitable proceedings as a make-weight —to insure that the court will take jurisdiction even if the main argument lacks substantial grounds. Respondents contend that aside from being without merit, the argument was abandoned on appeal.

STATUTES WHICH THE CASE INVOLVES

Title 42, U.S.C. Section 1981. *EQUAL RIGHTS UNDER THE LAW.*

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Title 42, U.S.C. Section 1982. *PROPERTY RIGHTS OF CITIZENS.*

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Title 42, U.S.C. Section 1983. *CIVIL ACTION FOR DEPRIVATION OF RIGHTS.*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The essential facts are contained in the complaint and transcript of the trial court proceedings. The statement of the case is taken from Respondent's brief in the Court of Appeals and references are to the official record of the lower court proceedings.

Plaintiffs are all classified black policemen, in good standing, who are now regularly employed by the City of Miami Police Department under Civil Service.

Defendant is a corporation, chartered under the laws of the State of Florida. Among its expressed purposes are to promote the efficiency of the Police Department, to promote cooperation and harmony of its members, and to promote harmony and cooperation with the general public and public officials. (Plaintiffs' Exhibit 1). Membership in the corporation is made up exclusively of white police officers who are regularly employed by the City of Miami Police Department under Civil Service. A. 459. No black has ever been accepted into membership (A. 416-417), even though one black officer testified to having submitted an application for membership as early as 1959. A. 499. There are now over four hundred (400) members in Defendant corporation. (Plaintiffs' Exhibit 4).

Defendant corporation had a clause in its Constitution since inception more than twenty-five (25) years ago which limited membership to white males. Any Caucasian male in good standing with the Miami Police Department was eligible for membership if he had not attained the age of thirty-three (33). (Plaintiffs' Exhibit 2). Upon the submission of an application along with a fee of Five dollars

($5.00), membership was almost automatic. A. 445. A mere majority approval of those present and voting was required for the acceptance of a new applicant into membership. (Plaintiffs' Exhibit 2). According to a very active member of defendant corporation who had been in office twelve (12) years, only one (1) white applicant had been denied membership prior to 1970. A. 444.

In early 1970, the constitutional provision which limited membership to white males was deleted. At the same time, the provision that a mere majority approval of those present could vote an applicant into membership was also deleted. In its place was added that five (5) negative votes of any number present could reject an applicant. (Plaintiffs' Exhibit 1). The second change negatived the first so as to continue effectively to bar black policemen from membership.

In 1970, the Miami Police Department, under new administration, initiated a community interaction program aimed at bettering community police relations in minority communities. Selected officers were assigned to attend impromptu talk sessions with community residents. At one of such meetings an officer of defendant corporation was questioned by a citizen as to why no black officers were members of the Defendant corporation, Police Benevolent Association. The response to the public was that none had ever applied. A. 481-482.

Shortly thereafter, on December 21, 1970, seven (7) young black officers in excellent standing with the Miami Police Department submitted applications for membership along with checks in the required amount of Five dollars ($5.00). Each of the applicants received letters from the

president of defendant corporation, dated January 14, 1971, informing them their applications for membership had been rejected at the Regular Meeting held January 13, 1971. (Affidavits accompanying original Complaint.) The application fee was also refunded.

After the rejection, the applications were re-delivered to an agent of defendant for re-submission, but before the re-submission, the applicants agreed, and did withdraw their applications in favor of filing a law suit, knowing well that under the revised acceptance procedures that they would be rejected again. Plaintiffs brought this lawsuit on January 29, 1971 to enjoin defendant corporation from its racially discriminatory conduct which has excluded them from membership.

Defendant owns and operates a restaurant in the City of Miami Municipal Building. The profits derived from operations of the restaurant go into defendants' private funds. A. 438. For kitchen and janitorial work in the running of the restaurant, defendant uses freely the labor of prisoners in the City jail. A. 440. Neither the City of Miami, nor the prisoners, realistically, are individually compensated for labor performed. A. 440. Defendant failed to mention this in their Statement of the Case.

Defendant solicits its membership from the Miami Police Academy on the City premises during working hours. A. 443, 456-457. During the same hours, black police trainees have been informed by officers of defendant corporation that membership was not available to them—that black trainees should seek membership in the black police organization. A. 518, 533, 457.

Defendant operates vending machines placed in police headquarters in the City of Miami Municipal Building. A. 467.

Defendant is represented at all staff meetings of the police department of the City of Miami and helps bargain for wages at City Commission meetings. A. 457.

Defendant uses the facilities of the police department such as the roll-call room, for official activities and business of defendant corporation. A. 420-421, 512-513.

Defendant uses the name Miami Police in its title and holds itself out to the public as City of Miami policemen. (Plaintiffs' Exhibit 1 and 3).

Defendant solicits contributions from the public using the name Miami Police; Defendant solicited over ninety thousand dollars ($90,000.00) from the public in its last fiscal year by holding itself out to be police officers of the City of Miami Police Department. A. 428.

All of defendant's activities are conducted openly with the consent and approval of the City of Miami.

Defendant maintains the following funds which its membership is entitled to participate in, and which benefits its membership:

a. A death benefit fund

b. A group insurance fund

c. A retirement fund

d. A sick and disability fund

e. An attorney's fund.

Defendant has accumulated over one hundred thirty-seven thousand dollars ($137,000.00) in mutual funds and cash to use for the benefit of its members. A. 444. Additionally, defendant has the power to borrow from the monies solicited from the public for private use by its membership. A. 437.

From monies accumulated over a period of years, defendant has come into ownership of substantial real estate. A. 431-432.

Contributions made to the defendant association, according to its financial secretary, are tax deductible as charitable. Further, defendant enjoys tax-exempt status under Federal Internal Revenue Service Regulations. A. 437.

As non-members of defendant corporation, black police officers are excluded from social affairs sponsored annually for members and their families. Such social events are held on the grounds and in the buildings owned by defendant corporation. A. 460-461.

Defendant, Miami Police Benevolent Association, over the years has pursued a pattern or practice of racial discrimination which has deprived plaintiffs of the same rights enjoyed by white persons. Until recent years, Plaintiffs were not only ineligible for membership in defendant corporation, but could not eat in the restaurant owned and operated by defendant in the City of Miami Municipal

Justice Building — another fact which Defendant deliberately omitted from its Statement of the Case. A. 497.

At trial plaintiffs called the officers of Defendant corporation as their main witnesses and it was testimony of those corporate officers which formed the facts as found by the trial court. The facts are uncontradicted.

The trial court concluded as a matter of law that defendant, Miami Police Benevolent Association, "has engaged in a pattern or practice and custom or usage of racial discrimination in violation of the rights guaranteed black persons by 42 U.S.C. 1981 through 1983. The Court of Appeals in affirming believed that the appellees "made their case under §1983 and did not reach §§1981 and 1982.

REASONS RELIED ON AS TO WHY THE WRIT SHOULD BE DENIED

A. THE SUPREME COURT WILL NOT GRANT CERTIORARI TO REVIEW EVIDENCE AND DISCUSS SPECIFIC FACTS.

Where the decision of the Court of Appeals sought to be reviewed turns entirely upon an appreciation of the particular facts involved or upon construction of particular contracts or written instruments, a petition for certiorari ordinarily is denied as lacking "substantial grounds". [Remarks of Mr. Chief Justice Hughes at the ALI Meeting (1934) 20 A.B.A.J., 341]. It is true that in rare instances cases turning merely upon an appreciation of particular facts will be distinguished by an importance which the Court believes warrants reexamination by the Supreme Court. *United States v. McGowan*, 290 U.S. 592.

A further exception exists where two Courts of Appeals have made divergent findings of fact in respect of the same matter, since preservation of uniformity of decisions in lower federal courts is, of itself, a matter of public concern. But the conflict must be real, and a writ granted because of an asserted conflict will suffer dismissal as improvidently granted if after argument, it appears "that the asserted conflict in decision arises from differences in states of fact, and not in the application of a principle of law". *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813; *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202. In addition to the foregoing general considerations, it is a familiar principle often applied in the Supreme Court that findings of fact concurred in by two lower courts will be accepted by the Supreme Court unless clear error is shown. *Faulkner v. Gibbs*, 338 U.S. 267, 268.

The District Court found the facts indisputably as follows:

A. The Parties

1. The plaintiffs are all classified black policemen who are now regularly employed by the City of Miami Police Department under Civil Service, and all black classified policemen who will be regularly employed by the City of Miami Police Department under Civil Service in the future.

2. The defendant, Miami Police Benevolent Association, is a non-profit corporation made up of members of the Miami Police Department, and has its offices located in Miami, Florida. Among its purposes are to promote the efficiency of the police department, to promote coopera-

tion and harmony of its members, and to promote harmony and cooperation with the general public and public officials.

3. The defendant maintains the following funds which its membership is entitled to participate in and which benefits its membership:

a. A death benefit fund.

b. A group insurance fund.

c. A retirement fund.

d. A sick and disability fund.

e. An attorneys' fund.

4. This Court has jurisdiction over the parties and the subject matter of this action.

B. The defendant acts under color of state law and is an adjunct of the City of Miami Police Department.

1. The defendant uses the name police in its title and holds itself out to the public by using the name police in its title.

2. The defendant solicits contributions from the public using the name police. In fact, in the last fiscal year, the defendant solicited over $90,000 from the public by holding itself out to be police officers of the City of Miami Police Department.

3. It operates a canteen at the City of Miami Police headquarters. In operating this canteen, the defendant employs four persons, and in addition, uses prison labor. The canteen operation nets the defendant over $2,000 per month.

4. The defendant operates vending machines and has the use of bulletin boards at the City of Miami Police Department.

5. The defendant is represented at staff meetings held at the City of Miami Police Department where policies of the police department are discussed and made.

6. The defendant is represented at City Commission meetings where it bargains for wages and other benefits for the City of Miami Police Department.

7. The defendant uses the facilities of the local police department, including its police academy to solicit prospective members. In fact, it has enrolled over 75% of its members through solicitation at the police academy.

8. The defendant uses the City of Miami Police Department for meetings and in fact, has used the police department building in casting ballots for its officers.

9. All of the above activities are conducted openly with the consent and approval of the City of Miami Police Department.

C. Discriminatory Acts of the Defendant.

1. The defendant has never had a black member. At the present time the defendant has over 400 members, all of whom are Caucasian.

2. Until March 23, 1970, the defendant had a clause in its Constitution "For Caucasians Only". This clause made it impossible for a black person to become a member. In 1959, Willie Calhoun, a black officer applied and was rejected because of this clause. David Madison and George Kemp, black officers of the Miami Police Department, were told at the police academy that the defendant was for Caucasians only and that they should seek their own organization, the Community Police Benevolent Association.

3. Up until March 23, 1970, only one white applicant was rejected for membership in the defendant.

4. The defendant has always had a provision that a prospective member must be over 21 years of age and under 32 years of age.

5. The defendant has a clause that a person must be under 32 years of age because it maintains a death benefit fund. This fund is maintained on an actuarial basis, and on the basis of the recommendations of the defendant's actuaries, the above limit has been set.

6. On March 23, 1970, the clause "For Caucasians Only", was deleted from the defendant's Constitution. On March 23, 1970, the defendant also changed the voting procedure with respect to a prospective applicant. Prior to

March 23, 1970, it was only necessary for a prospective member to receive a majority vote of the membership in order to be accepted. After March 23, 1970, five negative votes of the membership could veto a prospective applicant.

7. Since March 23, 1970, 28 white applicants have applied for membership with the defendant. Only four white applicants were rejected. Since March 23, 1970, seven black applicants have applied for membership with the defendant. All of the black applicants were rejected on December 22, 1970. The four white applicants were rejected on the same date as the black applicants.

8. The deletion of the clause "For Caucasians Only" has been substituted for by the inclusion that the negative votes of any five members of the defendant can exclude a prospective applicant. This change is negative and has effectively barred black policemen from membership in the defendant.

9. The defendant, Police Benevolent Association, over the years has pursued and continues to pursue a pattern or practice of racial discrimination which has deprived and continues to deprive the plaintiffs of the same right to make and enforce contracts, the same right to enjoy property, and the same right to enjoy equal protection of the laws as is enjoyed by white persons.

10. The plaintiffs, over the years, have accepted all Caucasian applicants who were under the age of 32, who were regularly employed classified police officers for the City of Miami Police Department under Civil Service, who were in good standing with the police department, and who paid their $5.00 application fee.

11. By its own constitution and By-Laws, the only requirements for membership are that the applicant be a "classified police officer who is now regularly employed on the payroll of Miami Police Department under civil service or who may hereinafter become a member under civil service with the exception of the Director of Public Safety and the Police Chief . . . "

That the Petitioner is not a private club is well-founded in fact.

THE STATE IS SIGNIFICANTLY INVOLVED IN THE INVIDIOUS DISCRIMINATION.

It is held that where the impetus for the discrimination is private, the State must have "significantly involved itself with the invidious discrimination." *Reitman v. Mulkey*, 387 U.S. 369. In this case the court, without labor, found Petitioner to be not private, but entwined with the City of Miami Police Department. Even if it be assumed for argument that Petitioner is a private club, by the law of the cases the State would still be found significantly involved.

Petitioner argues that as a private club, there is no discrimination under color of law unless there is evidence that the State of Florida or City of Miami has *compelled* the act, relying on *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 169. The record will show that as recently as 1962, black policemen were assigned to a black precinct in a black neighborhood, were not permitted to attend the training academy at the Municipal Building along with

white policemen, were not allowed to sit and eat in the canteen operated by Petitioner in the City of Miami Building, were not represented in policy-making and bargaining sessions at staff and commission meetings, and that the exclusion from membership in the Police Benevolent Association is but a remaining vestige of many discriminatory laws, customs, and practices of the City of Miami.

First in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, and in *Reitman*, supra, this Court held that it has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestation" has become significantly involved in private discrimination. Only by sifting facts and weighing circumstances on a case-by-case basis can a nonobvious involvement of the State in private conduct be attributed its true significance.

In *Burton*, the Court found that the state had elected to place its power, property and prestige behind the admitted discrimination by inaction. After sifting all the facts and weighing circumstances the lower court decided that there was significant state action and the Court of Appeals did not believe that determination to be clearly erroneous.

Thus, it would have made no difference in the results if Petitioner had been found to be a private club. The facts support a finding of significant state involvement to make the discrimination in this case under color of law.

THE DECISION BELOW DOES NOT CONFLICT WITH THE SUPREME COURT OR OTHER COURTS OF APPEALS WITH RESPECT TO INTERPRETATION OF 42 U.S.C. §1983.

As a last desperate argument, Petitioner argues that the decision below was clearly erroneous with respect to application of the law but does not set forth any cases with similar states of fact. In *Adickes*, supra, the Court ruled that

> "the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections."

Unlike the *Adickes* case, the person charged with discrimination here is not a private party, in this case the lower court found a clear case of state involvement, and in the instant case the discrimination was not in personal affairs.

The cases cited by Petitioner in support of its argument that the decision below is in conflict with the decisions in other Courts of Appeals have no factual similarities to this case nor to each other. Petitioner does not even attempt to show factual similarities. *Cole v. Smith*, 344 F.2d 721, involved an assault on a prisoner by hospital aides. *Watkins v. Oaklawn Jockey Club*, 183 F.2d 440, was brought against an acting sheriff and deputy, who, along with the president of the club where the sheriff and deputy worked after leaving official duty, ejected plaintiff from the premises because of his race. *Williams v. Yellow Cab*

Company of Pittsburgh, 200 F.2d 302, may stand for the proposition that the mere fact that a union is licensed by the state does not mean that its discriminatory representation of members on basis of race constitutes significant state action. In *Lefcourt v. Legal Aid Society*, 445 F.2d 1150, the Court of Appeals for the 2nd Circuit in holding that the Society did not act under color of State law, considered all aspects of the organization to include its history, relationship to the public, persons it serves and its expressed purposes. Examined in the same light, it is readily apparent that Petitioner is, and always has been closely entwined with the City of Miami Police Department. State action does not require governmental control, regulation or interference. As in *Burton*, state action may take the form of inaction.

None of the cases cited by Petitioner evidences any real conflict in application of the law. The asserted conflicts arise not from the application of a principle of law, but from differences in states of fact.

RESPONDENTS HAVE BEEN DEPRIVED OF CONSTITUTIONALLY PROTECTED RIGHTS UNDER 42 U.S.C. 1981 THROUGH 1983.

It is clear that by excluding black police officers on account of race, Petitioner has denied Respondents, among other things, the following contract and property rights:

1. The right to be a member of a non-private organization even though Respondents meet all requirements.

2. The right to bargain for wages and fashion operational policies of the Miami Police Department.

3. The right to contract for death benefits, sick and disability benefits and low-cost legal assistance.

4. The right to use the P.B.A. facilities, attend membership meetings, and participate in P.B.A. social functions.

A pattern or practice which denies to black persons the same right to property and to make contracts as enjoyed by white persons violates 42 U.S.C. 1981 and 1982.

Denying to Plaintiffs enjoyment of the above rights and opportunities for the reason that they are black constitutes a badge or incident of slavery and is therefore prohibited. *Jones v. Mayer*, 392 U.S. 409; *Sullivan v. Little Hunting Park*, 396 U.S. 235; *Sanders v. Dobbs House*, 431 F.2d 604; *Mizell v. North Broward Hospital District*, 427 F.2d 468; *Harkless v. Sweeney Independent School District*, 427 F.2d 319.

In *Sullivan v. Little Hunting Park*, supra, the action of a community association in refusing to approve transfer of a white shareholder's membership share to a Negro incident to real property lease, which share would have given him the right to use the association's recreational facilities, violated 42 U.S.C. 1982.

CONCLUSION

The findings of fact of the lower courts are not clearly erroneous. The decision of the lower courts does not conflict with decisions of the Supreme Court and other Courts of Appeal with respect to application of 42 U.S.C. 1981 through 1983. Based on the complaint and answer filed in the trial court, there was not a right to trial by jury and besides, that issue was abandoned by Petitioners in the Court of Appeals.

The Petition for Writ of Certiorari states no substantial grounds for granting the writ therefore the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of July, 1972, three copies of the Response to Petition for Writ of Certiorari were mailed, postage prepaid, to K. NEIL GLASSFORD, Attorney for Petitioner, 802 Greater Miami Federal Building, 200 Southeast First Street, Miami, Florida 33131. I further certify that all parties required to be served have been served.

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